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In the

Supreme Court of the United States

October Term, 1926.

No. 577.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

v.

E. B. SPILLER, *et al.*

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

Edward T. Miller,
Alexander P. Stewart,
Frederick H. Wood,
Attorneys for Petitioners.

Robert T. Swaine,
Of Counsel.

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TABLE OF CASES AND STATUTES CITED

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REPLY BRIEF FOR PETITIONERS.

I.

The respondents' arguments in support of the contention that the Railroad Company was a trustee *ex maleficio* are inconsistent both with the provisions of the Act to Regulate Commerce and with the nature of a shipper's right to redress for exaction of unreasonable charges prior to the passage of that Act, and are unsupported by authority.

The right to sue in equity for the establishment of a trust *ex maleficio* is an ancient one. The right of a shipper to maintain a common law action to recover amounts collected in excess of a reasonable rate, wherein it was the function of the jury to determine whether the charge collected was unreasonable, and if so, to award damages in the amount of the excess, also long antedates the Interstate Commerce Act. *Texas & Pacific* v. *Abilene Cotton Oil Company*, 204 U. S. 426. No case is cited by respondents, and we have found none, holding that there was concurrent jurisdiction in equity to establish a trust *ex maleficio* in such amount as might be determined by the Chancellor. In the absence of any authority, since the remedy at law was adequate, it may be safely asserted that no such right existed prior to the passage of the Interstate Commerce Act.

Certainly no such right was created by that Act. Under it, reparation is recoverable only on "an award of damages" made by the Commission, enforceable in a civil suit to "proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." Under the law as it now stands such suit may be brought in either a Federal or a State court. At the time these charges were collected, however, the statute provided for the bringing of such suits in Federal courts only. *Hepburn Act*, Sec. 16, 34 Stat. 584, 590.

It admits of no doubt that it was the purpose of Congress, under the law as it then was, to make the statutory remedy exclusive of all others.

The existence of a concurrent right in equity to sue for the establishment of a trust *ex maleficio* as of the date of collection is wholly inconsistent with the statutory remedy provided, as pointed out in our opening brief (pp. 37-44). But even assuming a concurrent remedy in equity, it would seem that, the respondents having made their election to sue at law, and their original cause of action having been merged in a money judgment, they have lost their right to proceed in equity. *Cf. Equitable Trust Co.* v. *Conn. Brass & Mfg. Corp.*, 290 Fed. 712, 724.

Respondents' contention is also inconsistent with the substantive provisions of the Act and with its general theory. A violation of Section 1 (making the collection of unreasonable charges unlawful) unlike violations of many other sections of the Interstate Commerce Act, does not constitute a misdemeanor. On the other hand, if Section 6 (requiring the collection and payment of charges in accordance with published tariffs) is violated, both shipper and carrier are guilty of the commission of a crime. It is conceded that respondents' cause of action, whether in law or in equity, accrued when the charges were collected (Respondents' Brief, p. 27). It follows that if a trust *ex maleficio* then arose, the creation of the same could have been avoided only by the commission of a crime on the part of both shipper and carrier. It is not unusual for a trust *ex maleficio* to arise through the doing of an act amounting to a crime. The suggestion that it may also arise under such circumstances that it may be avoided only by the commission of crimes on the part

both of the person sought to be charged as a trustee and the *cestui que trust* as well, is, to say the least, novel.

The primary purpose of Section 1 was to establish a standard of rate making. What is a reasonable rate is a matter of judgment, the duty to exercise which is in the first instance placed upon the carrier, subject to review by the Commission. A finding by the Commission that the carrier's rate is unreasonable merely means that, in the opinion of the Commission, the carrier erred in its judgment. Trusts *ex maleficio* customarily arise from acts involving moral turpitude, such as active fraud, breach of fiduciary relation, physical duress, etc. Clearly such a trust does not arise through the exercise of an honest but mistaken judgment on the part of a person whose duty it is to exercise such judgment.

If the theory of the respondents is sound, every railroad in the United States at all times has in its possession indeterminate sums of money which it is holding in trust for unknown persons, dependent upon whether or not the Interstate Commerce Commission makes reparation awards on complaints filed within two years from the date of collection of such charges.

We know of no rule of equity under which a trust arises where the circumstances are such that neither party to the transaction knows, or can know by the exercise of any amount of diligence, whether such trust exists or not, until there has been a judgment by an entirely independent tribunal in some other case then pending or which may never be brought. The fact that in this particular case the Commission had already held the rates to be unreasonable is without significance. It had made no order upon the carrier to cease and desist from their collection, but re-

opened the case, took further testimony and did not finally decide it for more than two years after its first decision. In the meantime it was the carrier's right and duty to collect published rates. Furthermore, respondents' contention necessarily rests upon the theory that the exaction of an unreasonable rate gives rise immediately to the creation of the trust asserted, whether proceedings are pending at the time or not.

Respondents cite many cases in support of their position. Of these, all save *Love* v. *North American Company*, 229 Fed. 103, are of the familiar type in which courts of equity from time immemorial have established and enforced trusts arising from some breach of fiduciary duty, fraud, physical duress, or the appropriation of property without right and under such circumstances as at the time give rise to the creation of a trust. In this case the charges were collected not only in the exercise of the carrier's right conferred by the Interstate Commerce Act to fix its own charges, but under a mandate of Congress to collect the amounts so fixed.

In *Love* v. *North American Company*, *supra*, the carrier had been ordered by the Corporation Commission of Oklahoma to reduce certain rates. The carrier appealed to the Supreme Court of the State, as permitted by the State Constitution. As a condition precedent to the collection of its old charges, the carrier was required to give a supersedeas bond to pay back any amounts collected in excess of the rates determined to be reasonable, and to keep in a separate account a list of all excess charges collected. Its right to continue to collect its old rates was dependent upon its observance of these conditions. The

Commission's rate orders were affirmed, and within six months thereafter the carrier went into the hands of receivers. The proceeding in which the decision of the court was rendered was not a suit for the recovery of the excess over a reasonable charge, as such, but was a proceeding to recover on the bond, on which the cause of action had accrued within six months prior to the appointment of the receivers, and to have the claim allowed as preferential. The court held that such a preference should be allowed, as in the case of payments to sureties on other supersedeas bonds. The court also said that the moneys collected did not belong to the railroad company and should be repaid. It is on account of this language that the case is cited as authority for respondents' trustee *ex maleficio* theory.

We entertain some doubts as to whether the case was rightly decided, and it is, of course, not binding upon this Court. Passing that, however, it is apparent that the conditions were exceptional, and that the case is clearly distinguishable from this one. Except for the giving of the supersedeas bond, the carrier would have been compelled to obey the order of the Commission pending appeal, whether the orders were finally affirmed by the court or not. It was also required to keep in a separate account a list of all excess charges collected. While the amounts collected pending such appeal were not technically impounded, the court might well hold that since the right to collect was thus conditioned, the effect in equity was the same as though the amounts collected had been actually impounded and held in trust, awaiting the outcome of the appeal. The case is clearly no authority for the proposition that when an interstate carrier, in the exercise of the right

and duty prescribed by the Interstate Commerce Act, establishes and collects charges named in its published tariffs, it becomes a trustee *ex maleficio* in the event that subsequently reparation is awarded upon the ground that the charges collected were unreasonable. If it be regarded as authority for such proposition, then the decision of the Circuit Court of Appeals in that case was clearly erroneous upon the grounds already stated.

The only other overcharge cases cited by the respondents in support of the trust fund theory are *White* v. *Delano*, 270 Mo. 216, and *Mercantile Trust Co.* v. *St. Louis & San Francisco R. R.*, 69 Fed. 193. In *White* v. *Delano*, the suit was a suit at law, for money had and received, against the Wabash receivers for excess charges collected by the railroad company prior to receivership. No trust was declared and no preference allowed. In the *Mercantile Trust* case, the intervenor was the holder of a judgment against the railroad company obtained *prior to the making of the mortgage* being foreclosed. At the time the mortgage was executed, the enforcement of the judgment was suspended. The court held that the suspension of the enforcement of the judgment did not suspend the lien of the judgment. Therefore, the lien of the mortgage was subject to that of the judgment. The judgment was originally on account of an excess charge, but in view of the decision, the court's denunciation of carriers exacting excess charges, is mere dictum.

II.

The respondents have failed to trace the moneys collected, except into the general estate of the Railroad Company, and their contention that such tracing is sufficient to impose a trust upon the receivership estate or the property of the reorganized company is unsupported by authority.

The respondents have failed to trace the moneys collected except into the general estate of the Railroad Company. The argument that such tracing is sufficient to impose a trust upon the receivership estate or the properties of the reorganized company misconceives the doctrine of tracing trust funds.

The facts before this Court (R. 164, 331) show only that the many collections of overcharges went into various unspecified bank accounts of the Railroad Company; that the various bank balances of the Railroad Company, and later of the receivers, taken together, have, at all times since the collections were made, exceeded the total amount of the overcharges. It is not shown how much of the money was deposited in any specified bank accounts, nor in how many bank accounts these deposits were made. It is not shown that any particular bank account has always exceeded in amount the total amount of overcharges deposited in it. It is not shown that the bank accounts into which the overcharges were paid in 1906 and 1907 are the same bank accounts that exist today. Upon such facts, respondents cannot properly say that there has been a tracing of the funds, in the sense in which this doctrine is applied by courts of equity.

The language of the court in *In re A. D. Matthews' Sons*, 238 Fed. 785, is exactly applicable to this case:

"But further there is no proof as to what bank or fund received any of petitioner's money * * *. In other words, the most that petitioner can do toward bearing the burden of proof is to show that its money was put in three funds, or some one or more of them; but when or in what proportions cannot be spelled out. *Such evidence amounts to no more than showing that somewhere there was in the bankrupt's possession or under its control, until the times complained of, more cash or credits than petitioner now claims. This is not identification at all, nor is it tracing, for cash is never traced by showing that it went into the general estate; and the proof here goes no further.*" (Italics ours.)

The cases cited by the respondents do not support the doctrine for which the respondents contend. They are all cases in which either it was clearly not necessary to trace the funds at all, or in which the trust money was traced into a particular account or fund and there mingled with the funds of the trustee.

In the case of *Terre Haute & I. R. Co.* v. *Cox*, 102 Fed. 825, relied on by respondents, there was an equitable assignment of a portion of the gross earnings of the railroad to its lessor. The lease was a matter of public record, of which all creditors had notice, so that no rights of bona fide purchasers or creditors intervened. The gross earnings for six months ending about two months prior to receivership were alleged to be insufficient to pay operating expenses of the leased property, so that the entire gross earnings were consumed in operating expenses. The lessee

had other moneys which it could and should have used to pay such expenses, and which came into the receiver's hands and were being held for the benefit of the railroad's creditors. The court quoted the general language about following misappropriated property, which is set forth in respondents' brief. But its decision was clearly placed upon the ground that the funds which in equity belong to the lessor having been misappropriated for the benefit of the creditors of the lessee, the other moneys of the lessee coming into the hands of its receivers were, as against such creditors, charged with an equitable lien in favor of the lessor. There was no problem of "tracing" in this case.

In the case before this Court, there is no showing that the funds were applied to the benefit of the creditors, and there are rights of *bona fide* purchasers intervening.

If the *Terre Haute* case, which is of course not binding upon this Court, can be regarded as supporting the proposition that it is sufficient to trace converted moneys into the general estate of the trustee *ex maleficio*, then it is contrary to the great weight of authority.

The other cases cited by the respondents are so clearly distinguishable from the case at bar that no comment is necessary. Upon pages 45 and 46 of the respondents' brief two familiar rules are quoted:

> "It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the Receiver",

and

> "Proof that a trustee mingled funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling."

These two rules are correct statements of law and are consistent with each other. The second statement had reference to trust funds mingled in a particular deposit and its only application is to such a case. Yet if the respondents were correct in believing that that quotation can be applied to the present case, the first statement would be meaningless. If it is only necessary to show that the trust moneys were converted into various unspecified bank credits belonging to the insolvent, and that the insolvent's total credits of this kind have always been in excess of the trust moneys, then the tracing of funds becomes a very simple matter indeed in all cases where the insolvent has any considerable estate.

In the case at bar, there was no particular deposit, but rather a series of deposits and a series of funds, and there is no proof of the continued existence of these individual funds up to the time of the receivership. This is not tracing. It is only showing that the moneys went into the "general estate" of the railroad.

III.

The respondents are not entitled to an equitable preference.

Both the District Court and the Circuit Court of Appeals held that the respondents are not entitled to an equitable preference. Respondents' arguments that they are entitled to an equitable preference are based, first, upon the statement that money, even more than supplies, labor, etc., is necessary for the operation of a railroad in the usual course of its business, and hence should rank equally therewith, and second, upon the decision in *Love* v. *North American Company*, *supra*. Money advanced to a railroad company within six months, or any other period, prior to receivership, does not give rise to an equitable preference, even though used for operating expenses. *Morgan's Louisiana and Texas Railroad and Steamship Co.* v. *Texas Central Ry.*, 137 U. S. 171; *Penn* v. *Calhoun*, 121 U. S. 251; *Farmers Loan & Trust Co.* v. *Bankers & Merchants Tel. Co.*, 148 N. Y. 315; *Blair* v. *St. Louis, H. & K. R. Co.*, 23 Fed. 521.

We have already reviewed the *Love* case and pointed out that the claims were not presented as reparation claims, but as claims arising out of the enforcement of a supersedeas bond, where the cause of action accrued within six months prior to the appointment of a receiver, and that a preference was allowed on the same principle that similar preferences are sometimes allowed in the case of other supersedeas bonds. The authorities differ as to whether the claims of sureties on supersedeas bonds are entitled to

a preference.* In either event the *Louv* case is not authority for the allowance of a preference to the respondents in this case.

Respondents seek to distinguish *Chicago & Alton Railroad Company v. Trust Company*, 225 Fed. 940 (cited in our opening brief, p. 16) holding that overcharge claims were not entitled to an equitable preference, upon the ground that the claim was presented by a connecting carrier which had refunded the overcharges, instead of by the shipper himself. The case cannot be disposed of in this manner. If overcharge claims are preferential, they should be allowed for the benefit of connecting carriers, who have themselves repaid the charge and thereby become subrogated to the rights of the shipper, as well as of the shipper himself. But they are not preferential.

No case has been cited, and none has been found, in which it has been held that either overcharge claims or reparation claims are entitled to an equitable preference. Nor has it been the practice throughout the last half a century or more, during which a large proportion of the mileage of the American railroads has passed through the hands of receivers, to allow such claims as preferential. The fact that such claims have not been so allowed is at least persuasive that they are not entitled to a preference.

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*The following cases held such claims were entitled to priority: *Union Trust Co. v. Morrison*, 125 U. S. 591; *Farmers Loan and Trust Co. v. Northern Pacific R. R. Co.*, 71 Fed. 245; *City Trust Co. v. Scranton Light & Traction Co.*, 123 Fed. 847.

The following cases held such claims were not entitled to priority: *Whitely v. Central Trust Co. of New York*, 76 Fed. 74; *Foote v. Grant Shoshone & Twin Falls Water Power Co.*, 232 Fed. 735; *Guaranty Trust Co. of New York v. Birmingham R. L. & P. Co.*, 238 Fed. 832; *Gay v. Hudson River Electric Power Co.*, 182 Fed. 988; *United States Fidelity & Guaranty Co. v. United States & Mexican Trust Co.*, 258 Fed. 258.

The displacement of mortgage liens in behalf of unsecured creditors "should be exercised with very great care" (*Miltenberger* v. *Logansport Railway Company*, 106 U. S. 286), and preferential allowances, when made, are of an exceptional character and should be restricted to debts incurred for supplies or services not simply necessary for the preservation of the road, but necessary to its business. *Gregg* v. *Metropolitan Trust Company*, 197 U. S. 183. Certainly it will not be contended that liabilities incurred under orders requiring payment of reparation are claims of such character.

IV.

The respondents' claims are barred because they were not filed with the receivers in accordance with the orders of the Court.

The respondents are barred by their failure to file their claims. It is customary and proper for the receivership court to make orders requiring the filing of claims within a specified period. As the court said in *Phelan* v. *Middle States Oil Corp.*, 15 F. (2d) 88:

> "Important and necessary is it that the courts have power to require creditors to file their claims. The power to require infers the power to penalize. The penalty for failing to comply is usually a denial of participation."

While the filing of claims is sometimes allowed after the date limited by the court, and before the distribution of the estate,* we have found no case in which a claimant, who had knowledge or notice of the receivership and sale,

was allowed to come in and file his claim after the estate had been distributed. The rule which permits the filing of claims after the time limited for filing has elasped, is restricted to cases where the claimant not only can show some equitable reason for his delay, and where no inequity will be done to other parties, *but where the estate, in whole or in part, is still in the hands of the court.***

This doctrine is merely an application of the rule that a valid foreclosure sale cuts off all creditors who have not proved their right to participate in the distribution of the insolvent estate. The estate was distributed before the respondents made any claim to participate in it.

There is even a stronger reason for requiring the filing of claims which may be entitled to a preference and to be paid by the purchaser of the properties upon foreclosure of the mortgages. Such claims constitute a part of the purchase price, and must be paid by the purchaser in addition to the amount of his bid. Unless such claims are filed so that the bidder may take them into account, he must reckon the possibility that such claims may be presented in the future and must reduce his bid accordingly. The orderly administration of insolvent estates requires the filing of claims, whether preferred or not. After the sale has been confirmed and after the proceeds of sale have been distributed to creditors, it is too late, as a practical matter,

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**Williams v. Gibbes*, 17 How. 239; *MacDonald v. Aetna Indemnity Co.*, 93 Conn. 339; *Employers' Liability Assur. Corp. v. Astoria Mahogany Co.*, 6 F. (2d) 943; *People ex rel Atty. Gen. v. Security Ins. & Ann. Co.*, 79 N. Y. 202; *Pattberg v. Lewis Pattberg & Bros.*, 55 N. J. Eq. 604; *Wall v. Young*, 34 N. J. Eq. 24; *In re Ziegler* 98 N. Y. Supp. 681; *Grennell v. Merchants Ins. Co.*, 16 N. J. Eq. 283; *Eddy, Petitioner*, 15 R. I. 474.

***Park v. New York &c. Ry.*, 140 Fed. 799; *Halsted v. Forest Hill Co.*, 109 Fed. 820; *Bickford v. McComb*, 88 Fed. 428; *Standard L. & P. Co. v. Twin City Motor Speedway Co.*, 138 Minn. 294; *Blake v. Domestic Mfg. Co.*, 41 Atl. 326 (N. J.); *Abraham v. Mercantile Trust & Deposit Co.*, 86 Md. 254.

to provide for the late comer without thereby treating the other creditors who have filed their claims, and the purchaser, inequitably. In reliance upon the effectiveness of the court's final decree, the securities of the new company had been traded in and sold to *bona fide* purchasers, for over four years before respondents filed their intervening petition. It would be most inequitable to permit the respondents to upset that decree as to their claims. There is no reason why respondents, whether or not entitled to a preference, should stand in a better position than any other contract or tort creditors, or be excused from the diligence which courts of equity exact from claimants against insolvent estates. Respondents sat by and permitted the sale of the estate, the confirmation of the sale and distribution of the proceeds. They are barred by their failure to file their claims from enforcing them now to the detriment of *bona fide* purchasers.

V.

The respondents cannot recover under the doctrine of the *Boyd* case.

In respondents' brief (pp. 57-60) it is contended that they are entitled to recover under the rule announced in *Northern Pacific Railway Company* v. *Boyd*, 22 U. S. 482, whether or not their claims are preferential and whether or not there is a trust, since the stockholders were given an interest in the reorganized company.

It is not open to respondents to make such a contention in this proceeding.

First, the proceeding was instituted by a petition of intervention in the receivership case, which on its face

was filed "pursuant to the final decree entered therein" and sought relief as a preferential creditor under such decree (Intervening Petition, R. p. 14 *et seq.*). Respondents may not attack the validity of the very decree under which they are claiming.

Second, even assuming that respondents may claim both under and against the decree at the same time and in the same proceeding, their petition of intervention is wholly lacking in the averments necessary to raise the issues of fact and law involved in any suit based upon the rule announced in the *Boyd* case. It did not allege that the stockholders of the old company participated in the reorganization, or that, if they did, a fair and timely offer of participation to general creditors was not made.

Third, even assuming that respondents may claim both under and against the decree at the same time and in the same proceeding, and further that they may recover even though the averments of their intervening petition are insufficient to state a cause of action under the *Boyd* case, the record before the Master is wholly deficient to support the relief sought. The final decree, (R. p. 634) provided in effect that if the purchaser should be a corporation in which stockholders of the old company were given participation, such sale would not be confirmed in the absence of a fair and timely offer of cash or of participation in such corporation, to general creditors who had presented their claims in accordance with the orders of the court, and reserved jurisdiction to determine whether such offer had been made and to modify the decree in case the court determined that no such offer had been made. The order of confirmation (R. p. 679), recites that a fair and timely offer of cash or a fair and timely

offer of participation in the new company had been made in accordance with the foregoing provisions of the decree.

There is no evidence as to what the offer made was, what conditions, if any, were imposed thereon, the time, if any, within which the same was required to be accepted, or whether the offer as made actually extended to creditors who had not filed their claims in the receivership proceedings as well as to those who had. Without these facts before it, this Court cannot determine whether not a fair and timely offer had been made and the requirements of the rule announced in the *Boyd* case satisfied.

The only evidence in the record that stockholders of the old company were given participation in the reorganization is that contained in the Reorganization Plan offered by the respondents. Its reception in evidence was objected to generally and also specifically, if offered for the purpose of discrediting the final decree. Counsel for the respondents was also asked to state the purpose for which it was offered, and in stating the purpose he did not indicate that it was offered as a basis for any relief under the rule announced in the *Boyd* case (R. pp. 340, 341). It thus appears that neither in the pleadings nor in the taking of testimony before the Master was any claim under the rule of the *Boyd* case raised or the facts relevant to the existence or non-existence of such a claim developed.

The respondents cite *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 878; *Walden* v. *Bodley*, 14 Pet. 156; *Guardian Trust Company* v. *Cambria Steel Company*, 210 Fed. 696, in support of their right to raise this contention. In each of these cases, while there were certain formal defects in the proceedings, the pleadings raised all the issues of fact and law essential to the relief sought, and the record contained

all the facts necessary to a determination of the question decided.

The respondents, therefore, may not recover under the rule announced in the *Boyd* case, first, because by seeking relief under the decree they are precluded from attacking it; second, because the intervening petition does not tender the issue; and third, because the facts necessary to a decision thereunder are not before the Court.

In these circumstances, it is hardly appropriate to discuss the merits of any claim that respondents may have under the rule of the *Boyd* case. We desire, however, to point out that the order of confirmation recites that a fair and timely offer was made to all creditors who had filed their claims in accordance with the orders of the court. It is said by the respondent in their brief that no offer was made specifically to them. In only the most narrow sense is this true: even the meagre evidence in the record shows that in legal effect an offer was made to them which the court administering the property found to be fair and timely (R. p. 679). In the administration of a large railroad receivership and the perfection of reorganization plans thereunder, the reorganizers are not required to search out every creditor and address to him in person, as contrasted with his class, a specific offer in order to satisfy the requirements of the *Boyd* case. As a practical matter, such a requirement would be impossible to meet. Only creditors whose claims are allowed in the receivership proceedings are entitled to distribution of the proceeds of sale. Creditors not presenting their claims for allowance, in accordance with the orders of the court, are barred. Participation by creditors in a reorganization plan is merely a substitute for their acceptance of their

distributive share of the proceeds. *Indeed, it is believed that to extend an offer to creditors who are not entitled to share in the proceeds of sale would make the offer unfair to the other creditors whose claims have been filed and who are entitled to share in the proceeds of sale.* An offer to creditors entitled to share in the proceeds of the *res* sold must necessarily satisfy the rule of the *Boyd* case, for the right of the creditor established by that case is predicated upon his equitable interest in that *res*. And since every creditor of the insolvent Frisco, including the respondents, was given ample opportunity to file his claims, an offer to creditors based upon their filed claims was in legal effect an offer to all creditors. Every creditor was thus afforded "fair opportunity, measured by the existing circumstances, to avail himself of this right." *Kansas City Terminal Railway Company* v. *Central Union Trust Company*, 271 U. S. 445, 454.

Manifestly, if claims of general creditors may be barred because not filed, the right of such creditors to attack the decree as void as to them, where a fair offer was made to those who did file, may likewise be barred by the court's decree. Only creditors who have filed their claims may participate in the proceeds of sale, and only to such creditors need offers be made, to be accepted by them at their election in lieu of their share in such proceeds. It is inconceivable that, while a creditor who has filed his claim can be limited to a choice between his distributive share of the proceeds of sale and a participation in the reorganization, a creditor who has not filed his claim may recover its entire amount in cash from the purchaser. All that a creditor would have to do, in order to be paid in full, would

be to refrain from filing his claim. It may be noted in passing that in a case arising out of this reorganization, Judge Sanborn held that a creditor who had not filed his claim was bound by the adjudication of the fairness of the offer to creditors and might be enjoined from prosecuting in a state court an action founded on the rule of the *Boyd* case. *St. Louis-San Francisco Ry.* v. *Wall,* Cons. Cause Eq. No. 4857, D. C., E. D. Mo., E. Div., July 1, 1918 (not reported).

It would be especially inequitable to grant relief to these respondents under the rule announced in the *Boyd* case. They had actual knowledge of the receivership and were put on notice as to the provisions of the orders made therein. Their own senior counsel testified (R. p. 646) that, of his own experience in receivership cases, he knew it was customary for the court by order to require presentation of claims within a designated period. Yet they made no effort to find out what the requirements of the court were, or to file their claims in accordance therewith, although they could easily have filed them and at the same time prosecuted their actions at law for the enforcement of the Commission's award, as is constantly done where the validity of a claim asserted is already in litigation. See *Kline* v. *Burke Construction Co.,* 260 U. S. 226. Indeed, counsel must have known from the beginning that, whatever the outcome of their litigation on the reparation award, in order to have any claim against the receivership estate, either as a preferred or general creditor, they were required to file their claims in accordance with the order of the receivership court. It also appears that they likewise had actual knowledge of the orders of the court and

presumably of its decree, prior to confirmation of sale, and that they were present at the hearing on confirmation (R. p. 587). They did not at that time, although present in court, call their situation to the attention of the court, ask leave to file their claims *nunc pro tunc,* ask for an exception of the decree in their behalf pending the determination of their litigation, ask leave that the offer of participation in the reorganization scheme be kept open to them, or take any steps to present their claims for adjudication, either as preferred or general creditors, prior to complete distribution of the proceeds of sale. If they did not bring themselves within the class to which a specific offer was made, it was their own fault, and it would be clearly inequitable to permit them now to recover the full amount of their claim on the theory that the sale was void as to them, and thus to be preferred to other general creditors, who had filed their claims and had either accepted the offer or taken their distributive share of the proceeds of sale. True, they served notice of their claims upon the attorney for the Reorganization Committee, but, as pointed out by Judge Sanborn, the service of such a notice is not an adequate substitute for legal action (R. p. 229).

In any event, upon this record, without any showing as to what the offer was, how made, upon what conditions, and for how long, we are confident that the Court will not decide that a decree cutting off creditors who have not filed is void, even if it were open to the respondents to make such contention in this case.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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